United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

May 26, 2010

The Honorable Christine Varney
Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Assistant Attorney General Varney and Chairman Genachowski:

I am writing to you concerning the proposed acquisition by Comcast of a controlling interest in NBC Universal ("NBC"), which is now under review at the Justice Department and Federal Communications Commission. Our Subcommittee has been examining the competitive implications of this transaction, and held a hearing on the proposed acquisition on February 4, 2010. I believe this proposed acquisition presents important competition and communications policy concerns which should be carefully scrutinized by the Antitrust Division and FCC, and should your agencies decide to approve this transaction, you should adopt conditions necessary to avoid the risk of injury to competition and consumers.

This acquisition, if consummated, would combine two media powerhouses and would give the nation's leading cable TV company control over one of the four main broadcast television networks with a treasure trove of broadcast and cable TV programming, having far reaching effects on our nation's media landscape. We appreciate Comcast and NBC's position that this acquisition will promote the public interest "by increasing the quantity, quality, diversity, and local focus of video content"[1] and enhance competition by making Comcast and NBC "stronger, more effective players in video programming, spurring other content producers and distributors to invest and innovate."[2] Nonetheless, our examination of this transaction has led us to conclude that Comcast's acquisition of NBC Universal has the potential for serious anticompetitive and anti-consumer effects in at least three respects.

First, this deal raises concerns regarding the ability of pay TV services (which include cable, satellite and telephone company video services, all of which are known as

---

[1] FCC Applications and Public Interest Statement of Comcast Corporation, General Electric Company, and NBC Universal, Inc. at 1 (filed January 28, 2010).
[2] Id. at 2.

"MVPDs") that compete with Comcast to gain access to NBC broadcast and cable content, and on what terms. Competing MVPD providers have expressed concern that Comcast will have an incentive to withhold, or raise the prices it charges for NBC broadcast and cable programming. With respect to the latter, such a "raising rivals' costs" strategy could be very destructive to price competition in the MVPD market, as MVPDs could be expected to pass these programming cost increases on to their subscribers, or lose customers to Comcast if they are not able to pay the higher cost of programming. In addition, Comcast's acquisition of the ten NBC owned-and-operated broadcast TV stations would mean that it could employ this strategy in retransmission consent negotiations as a means to raise the costs of "must have" NBC broadcast programming to its MVPD rivals. Finally, competing MVPDs also fear that with Comcast gaining more content it will have even greater leverage to bundling dozens of channels together so that MVPDs have to purchase all of them in order to get the "must have" programming they need. This could harm the MVPDs' ability to compete with Comcast and offer consumers the choices they want.

Comcast defends its acquisition in this regard by asserting that existing FCC rules prohibit it from denying programming it owns to its MVPD competitors and that it would be uneconomical for it to raise programming costs. However, many MVPD competitors complain that the enforcement of program access rules at the FCC has been weak and ineffective and note that Comcast has argued in court and at the FCC that the program access rules are invalid. Further, these rules are set to expire in 2012. Additionally, the program access rules simply require that Comcast makes programming it owns available to its MVPD competitors on reasonable and nondiscriminatory terms. Nothing in these rules would prevent Comcast, from raising the price of NBC broadcast and cable programming equally to all MVPDs once it acquires NBC. Therefore, should your agencies approve this deal it should be conditioned to prevent the combined entity from leveraging its must-have programming to raise its rivals costs, thus harming competition.

Moreover, competition is also harmed when must-have programming owned by an MVPD is denied to competitors by distributing it terrestrially so that the program access rules do not apply (what is known as the "terrestrial loophole"). I applaud the FCC's efforts to address this problem through its rule making of January 20, 2010.[3] Nonetheless, I recommend a merger condition forbidding the denial of NBC cable programming to competing MVPDs on the grounds that such programming is being delivered via terrestrial means.

Second, the acquisition raises troubling concerns with respect to the ability of unaffiliated and independent programmers to gain access to the combined Comcast/NBC distribution platform. Promoting a diverse media of voices has long been a goal of the Antitrust Subcommittee. Therefore, I share the concerns raised by independent programmers that after Comcast acquires NBC programming, it may be even more difficult for them to gain carriage on Comcast, carriage that they believe is essential to successfully enter the programming market. Comcast asserts that it would have no incentive to block the launch of compelling independent programming. However,

[3] First Report and Order, MB Docket 07-198, FCC 10-17 (January 20, 2010)

Comcast already is under challenge from certain independent programmers regarding allegations that it discriminates in favor of its affiliated programmers in violation of the FCC program carriage rules and statutory requirements. The acquisition of NBC's substantial programming assets could give the combined entity more opportunities and greater incentive to engage in illegal discrimination against non-affiliated programmers Therefore, meaningful requirements related to program carriage must be a condition to approving this merger.

Third, this deal's impact on the new methods of delivering video content over high speed Internet connections should be scrutinized closely. Millions of consumers have begun to utilize Internet web sites such as Hulu to view full length programming that has traditionally been shown on cable and broadcast television. And, numerous companies are experimenting with new business models for delivering content directly to consumers over high speed internet connections – including television and blue-ray disc manufacturers, Apple TV, Roku, Boxee, and Zillion TV, to give a few examples. Industry reports have estimated that 800,000 households have even dropped their traditional MVPD subscriptions, preferring to view video content over the Internet (often referred to as "cord-cutters"). It is clear that video over the Internet has the real potential to become a strong competitive alternative to traditional MVPD providers and offer consumers new choices to obtain video programming without expensive MVPD subscriptions.

With respect to this issue, Comcast argues that the development of video over the Internet is too nascent, and business models as yet uncertain, to be worthy of antitrust scrutiny. It also claims to embrace the delivery of video programming over the Internet. However, when examining these issues, we urge you to be guided by the pronouncement of the new proposed Justice Department/Federal Trade Commission Horizontal Merger Guidelines that it is "Congressional intent that merger enforcement should interdict competitive problems in their incipiency."

It is my view that your agencies should carefully scrutinize this acquisition to insure that it does not in any way stifle, retard, or block the emergence of video over the Internet (what is known as "over the top video services") as a potential competitor to traditional pay television services. Particular care should be paid to Comcast's acquisition of NBC's 32% ownership stake in Hulu. Hulu today competes directly both with Comcast's website, Fancast.com, and to some extent with Comcast cable television service itself. Hulu delivers programming from the broadcast networks and cable channels of NBC, ABC and Fox, currently without charge to viewers. Viewers may watch the programming shown on Hulu at any time and without purchasing any cable television service. After the acquisition, Comcast will have the incentive to exercise its influence as a part owner of Hulu to ensure it does not become a competitive threat to Comcast's cable television services.[4]

[4] This issue was recently implicated by the manner in which NBC showed the Vancouver Winter Olympics in February on its Olympics web site, NBCOlympics.com. Viewers could only access the certain live and pre-recorded coverage of Olympic events on the web site if they already subscribed to MVPD service from one of NBC's MVPD partners. Those without MVPD subscriptions could not access this coverage because

Beyond the concerns raised by one of the largest MVPD providers gaining part-ownership of Hulu, your agencies should insure that Comcast does not exercise its leverage as an MVPD to coerce or induce programmers – particularly unaffiliated programmers with little bargaining power and who are dependent on access to the Comcast cable platform – to keep their content off of non-Comcast affiliated Internet delivery platforms. If Comcast exercised such a strategy, it could effectively starve these new, emerging Internet distributors of the content they need to compete. Comcast has already begun to roll out its "TV Everywhere" model of distribution, under which Comcast subscribers can have full access to their cable programming wherever they are. While this business model unquestionably offers benefits to consumers, it also could potentially harm competition should it become the exclusive manner in which programmers deliver their content over the Internet. The added strength of the combined Comcast/NBC heightens these concerns.[5]

I therefore urge the Justice Department to carefully scrutinize each of these issues under the antitrust laws, and only approve the merger should it determine that with sufficient conditions the transaction is unlikely to cause any substantial lessening of competition in any of the markets implicated. Likewise, the FCC should also carefully scrutinize each of these issues under the Communications Act to ensure that this transaction, in conjunction with strong conditions, comports with communications policy and the public interest.[6]

Such conditions should include the following –

1. A requirement that Comcast make any programming or programming channel in which it has a financial interest (including the NBC broadcasting and cable networks to be acquired by this transaction) available to any MVPD on reasonable and nondiscriminatory terms. This requirement would be independent of the existing FCC program access rules, and apply regardless of whether the current FCC program access rules are in force, and regardless if they would apply. Among other things, this would

---

it was locked behind a "pay wall," despite the fact that, as of February 2010, NBC was wholly independent of any MVPD company. My letter of February26, 2010 to Jeff Zucker, CEO of NBC Universal, raised these concerns and asked the question "whether requiring a pay TV subscription to access NBC internet content will be a standard policy in the future after this merger is completed."

[5] Beyond our examination of Comcast's acquisition of NBC, this Subcommittee will continue to investigate the issue of the distribution of video content over the Internet in general, and intends to hold a hearing on these issues in the future.

[6] An additional communications policy related concern arising from this transaction is the future of free over the air broadcast television. Once the acquisition is complete, Comcast could easily migrate NBC network programming now available for free on over the air broadcast TV to cable networks, forcing millions of consumers to pay for "must have" content they currently enjoy without charge. While the parties have promised that the combined entity will "continu[e] to provide free over-the-air television through its O&O broadcast stations and network affiliations," they also hedge this promise by stating that "Comcast will continue its cooperative dialogue with its affiliates toward a business model to sustain free over-the-air service that can be workable in the evolving economic and technological environment." Commitment #1, "Applicants' Voluntary Public Interest Commitments" I urge the FCC to consider this issue closely, and take all steps necessary to ensure that free over the air content be retained.

preclude Comcast from using the terrestrial loophole in the program access rules, or expiration of the rules in 2012, from denying MVPD competitors the opportunity to purchase such programming on reasonable and nondiscriminatory terms.

2. A requirement that Comcast/NBC agree to enter into binding commercial arbitration for disputes over retransmission consent of NBC owned-and-operated broadcast television stations on MVPDs. Further, Comcast should be required to allow these channel(s) to be carried on the MPVD while the dispute is being arbitrated under the same terms and conditions as the expired retransmission consent agreement.

3. A requirement that Comcast/NBC will implement appropriate safeguards and procedures, including firewalls, to prevent information sharing between Comcast and NBC regarding pricing or other contract terms regarding pricing or contract terms offered by Comcast's MVPD competitors to purchase programming.

4. A requirement that Comcast agree not to discriminate against programmers seeking carriage on Comcast in favor of any Comcast-owned programming, including the NBC broadcast and cable programming to be acquired in this transaction. This requirement would be independent of the existing FCC program carriage rules, and apply regardless of whether or not those rules are in force. This merger condition should specifically ensure that, even if offered carriage, a non-affiliated programmer should not face discrimination with respect to channel placement or tiering (such as, for example, being placed on an expensive digital tier while the comparable Comcast-owned channel is shown on a basic tier).

5. A requirement that Comcast not seek to prevent or coerce programmers from keeping their content off Internet web sites or Internet distributors as a condition of carriage on Comcast. Such a condition may allow reasonable "windows" of programming (for example, that first run video programming be exclusive to Comcast for a reasonable time limited period) or for reductions in the payments to programmers in reasonable proportion to the percentage of the subscribers estimated to be lost to viewing of content on the Internet, but should be designed to prevent Comcast from leveraging its power as a distributor to block competitive Internet web sites from gaining access to video programming shown on Comcast.

6. A requirement that Comcast make any programming or programming channel in which it has a financial interest (including the NBC broadcasting and cable networks to be acquired by this transaction) available via Internet distribution to its competitors on reasonable and nondiscriminatory terms, in the same manner as if the program access rules applied.

7. A requirement that NBC content to be viewed on the Internet not be tied to an MVPD subscription – that is, an MVPD subscription not be required to view NBC content on the Internet.

8. A requirement that Comcast divest NBC's interest in Hulu within a year of this acquisition.

9. A requirement that Comcast not migrate the principal programming of the NBC broadcast network to any cable network in which Comcast has a financial interest for ten years.

10. A requirement that Comcast and NBC maintain a firewall between advertising in markets where NBC owns and operates a broadcast station(s) with respect to the sales of advertising on NBC owned broadcast stations.

11. A requirement that Comcast not discriminate against or degrade in quality on its broadband network any Internet distribution of programming which competes or seeks to compete with Comcast or TV Everywhere.

Any conditions placed on the transaction should be in the form of a legally binding and enforceable undertaking, either as part of an antitrust consent decree or a condition to the FCC's approval of the license transfer. In addition, all of the "Applicants' Voluntary Public Interest Commitments" made as part of Comcast's and NBC's January 28, 2010 Public Interest Statement filing with the FCC should be made legally binding and enforceable. With respect to conditions imposed by the FCC, actions to enforce the required conditions should be reviewed in a prompt and timely manner so that neither competition nor the public interest is harmed.

In sum, Comcast's proposed acquisition of NBC has the potential for profound and far-reaching effects in many markets, including competition in the MVPD market, the access of non-affiliated programmers to a quarter of the nation's homes through the Comcast cable system, and the ability of a nascent and potentially promising new form of competition – video over the Internet – to thrive. Particular care should be taken by your agencies to ensure that existing MVPD competition is not seriously injured, nor promising new forms of competition on the Internet stifled. The stakes for American consumers and competition in the media industry arising out of this transaction, as well the implications for diversity of information and entertainment, are very high and thus this acquisition is worthy of the most serious review at your agencies.

Thank you for your attention to this matter.

Sincerely,

Herb Kohl

HERB KOHL
Chairman, Subcommittee on
Antitrust, Competition Policy
and Consumer Rights